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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, A. D. 1932.

No. [redacted] 2

JOHN FACTOR,

Petitioner,

vs.

H. C. W. LAUBENHEIMER, United States Marshal, and GODFREY HAGGARD, His Britannic Majesty's Consul General,

Respondents.

BRIEF OF PETITIONER ON CERTIORARI.

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BRIEF OF PETITIONER ON CERTIORARI.

I.

Opinions of courts below.

The majority and minority opinions of the United States Circuit Court of Appeals for the Seventh Circuit (reported 61 Fed. (2d) 626) appear in full in the record, pages 1166 to 1179. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division (unreported), appears on pages 51 to 58 of the record. For the convenience of this Court all three of these opinions were reprinted as Appendices C and D to the brief in support of the petition for the issuance of the writ of certiorari, bound under separate cover and filed in this Court.

II.

Statement of the case.

The writ of certiorari was granted by this Court on March 20, 1933 (R. 1290) to review the order of the Circuit Court of Appeals for the Seventh Circuit reversing the

judgment of the District Court for the Northern District of Illinois, Eastern Division, whereby petitioner had been discharged on *habeas corpus*.

On May 12, 1931, application was made under Article X of the Webster-Ashburton Treaty of 1842 and the Blaine-Pauncefote Convention of 1889 by Great Britain for the extradition of your petitioner from the State of Illinois to England (R. 10, 11). An amended complaint was filed May 25, 1931 by the British Consul General before United States Commissioner Walker at Chicago, Illinois, charging that petitioner had committed the offense of "receiving money knowing the same to have been fraudulently obtained." (R. 12, 13.) The application for extradition was based upon a charge made in London on the 10th day of December, 1930, that petitioner had "received from Broad Street Press Limited" certain sums of money "knowing the same to have been obtained under circumstances amounting to a misdemeanor, to-wit, conspiracy to defraud." (R. 101, 102.) On January 12, 1932, Commissioner Walker issued his warrant (R. 8, 9) holding petitioner for extradition to Great Britain and certified the evidence to the Secretary of State under the provisions of Section 651, Title 18, U. S. C. A. (R. 76-78). On the same day, petitions for the issuance of a writ of *habeas corpus* (R. 2) and writ of certiorari in aid thereof (R. 33) were filed in the United States District Court for the Northern District of Illinois, Eastern Division. The case was heard by Judge George A. Carpenter of that Court, who, on February 11, 1932, ordered petitioner discharged. (R. 46.)

The validity of the warrant issued by the United States Commissioner was challenged in the District Court upon the ground that the offense with which your petitioner was charged in the extradition complaint was not a crime in the State of Illinois, and therefore not an extraditable offense under the then existing treaties between the United States

and Great Britain. Judge Carpenter held that "receiving money knowing the same to have been fraudulently obtained" was not criminal in the State of Illinois, that your petitioner was not charged with an extraditable offense, that the United States Commissioner therefore had no jurisdiction to hear and determine the extradition complaint, nor to issue his warrant holding petitioner for extradition. The Court accordingly held that the warrant under which your petitioner was restrained of his liberty was void.

An appeal from this order of discharge was taken to the United States Circuit Court of Appeals, which on October 15, 1932, by a divided Court reversed the District Court. (R. 1166-1179.) The majority opinion was written by Judge Alschuler and concurred in by Judge Sparks. Judge Evans filed a dissenting opinion in which he agreed with Judge Carpenter. (R. 1179-1183.) The order of discharge was reversed by the Circuit Court of Appeals on the ground that the language of the opinion of this Court in *Kelly* v. *Griffin*, 241 U. S. 6, compelled such action. Judge Carpenter and Judge Evans in their respective opinions distinguished the *Kelly* case from the instant case. (Judge Carpenter opinion R. 51-58; Judge Evans R. 1179-1183.)

A rehearing was denied by the Circuit Court of Appeals on November 15th. (R. 1218.) Thereafter on December 21, 1932, petitioner presented to the Circuit Court of Appeals a motion to set aside its majority opinion and judgment of reversal and to dismiss the appeal. (R. 1221.) This motion set forth the recent discovery of a new extradition treaty entered into by and between the United States and Great Britain abrogating the treaties under which petitioner was held for extradition. The new treaty, known as the Dawes-Simon Treaty of 1932, was shown to have been proclaimed by the President of the United States on the 9th

day of August, 1932. (R. 1234, 1235.) On the 26th day of January, 1933, the Circuit Court of Appeals refused to decide whether the Dawes-Simon Treaty of 1932 or Article X of the Treaty of 1842 and the Convention of 1889 controlled extradition between the United States and Great Britain, and overruled petitioner's motion to dismiss the appeal. (R. 1288, 1289.)

Questions Involved.

The ultimate questions which this case presents for determination are:

First. Whether "receiving money knowing the same to have been fraudulently obtained," the offense charged in this extradition proceeding, is a crime under the laws in force in the State of Illinois. The petitioner submits that this question must be answered in the negative, and that, so answered, this extradition proceeding fails regardless of which treaty is in force. However, were this question not answered in the negative, then the following additional questions would necessarily require decision:

Second. Whether the Dawes-Simon Treaty of 1932, which expressly abrogated the previous treaties under which this proceeding was instituted, came into force in the United States with the proclamation of the President on August 9, 1932.

Third. If the Dawes-Simon Treaty of 1932 came into force in the United States with the proclamation of the President on August 9, 1932, did it nullify all extradition proceedings then pending under prior extradition treaties, including the instant proceeding?

Fourth. If the Dawes-Simon Treaty of 1932 came into force in the United States with the proclamation of the President on August 9, 1932, and were assumed not to nullify but to govern proceedings then pending under prior

treaties thereby abrogated, does the Dawes-Simon Treaty of 1932 include, as an extraditable offense, the charge made against the petitioner?

Should the Court find that the decision of this case requires a determination of questions *Second, Third* and *Fourth,* then petitioner submits that the *Second* and *Third* questions must be answered in the affirmative and the *Fourth* in the negative and the petitioner discharged.

III.

Specifications of errors.

1. The Circuit Court of Appeals erred in holding that *Kelly* v. *Griffin* 241 U. S. 6, bound it to find that "receiving money knowing the same to have been fraudulently obtained" is a crime in Illinois.

2. The Circuit Court of Appeals decided erroneously, an important question of Illinois criminal law affecting international extradition. In reaching its decision, the Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings by refusing to determine the issue before it and holding itself bound by the general language in the opinion of *Kelly* v. *Griffin,* 241 U. S. 6, which, considered with the issues and facts in that case, is inapplicable here.

3. The Circuit Court of Appeals erred in holding that "receiving money knowing the same to have been fraudulently obtained" is an offense for which extradition may be had from the State of Illinois to Great Britain either under the Convention of 1889 or the Dawes-Simon Treaty of 1932.

4. The Circuit Court of Appeals erred in failing and refusing to decide whether the Dawes-Simon Treaty of 1932 is in force in the United States.

5. The Circuit Court of Appeals erred in not holding that the Dawes-Simon Treaty of 1932 is in force in the United States.

6. The Circuit Court of Appeals erred in not holding that the Dawes-Simon Treaty abrogated Article X of the Treaty of 1842 and the Convention of 1889.

7. The Circuit Court of Appeals erred in not holding that the offense charged in this extradition proceeding is not an extraditable offense under the Dawes-Simon Treaty.

8. The Circuit Court of Appeals erred in holding that the Dawes-Simon Treaty of 1932 included all of the provisions of Article X of the Treaty of 1842 and the Convention of 1889, including the offense for which petitioner's extradition is sought.

9. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

SUMMARY OF ARGUMENT.

I.

An offense, to be extraditable, must be (1) Enumerated in the Treaty, (2) Made criminal by the laws of the Demanding Government, and (3) One for which the accused could be held for trial in the state in which he is found.

Wright v. *Henkel,* 190 U. S. 40, 61.
Collins v. *Loisel,* 259 U. S. 309, 311.
United States v. *Rauscher,* 119 U. S. 407.
Pettit v. *Walshe,* 194 U. S. 205, 217.
Kelly v. *Griffin,* 241 U. S. 6.
Benson v. *McMahon,* 127 U. S. 457.
In re Frank, 107 Fed. 272.
In re Anderson, 11 Upper Canada Common Pleas Report 2.
In re Windsor, 6 Best & Smith's Rep. (England) 522.
Vol. 4, Chitty's Statutes, 6th Ed., p. 729.

II.

Unless the complaint in an extradition proceeding charges an extraditable offense as hereinbefore defined, the Commissioner is without jurisdiction and all proceedings thereunder and warrants based thereon are void.

Collins v. *Loisel,* 259 U. S. 309, 311, 312.
In re John Anderson, 11 Upper Canada Common Pleas Report 2.
In re Windsor, 6 Best & Smith's Rep. (England) 522.
In re Latimer, 10 Canadian Criminal Cases, 244.
Wright v. *Henkel,* 190 U. S. 40, 57, 61.
Kelly v. *Griffin,* 241 U. S. 6.

Pettit v. *Walshe,* 194 U. S. 205, 217.
U. S. C. A., Title 18, Chapter 20, Sec. 651.
Vol. 4, Chitty's Statutes, 6th Ed., p. 733.

III.

The complaint in this cause does not charge petitioner with an extraditable offense for the reason that "receiving money knowing the same to have been fraudulently obtained" is not criminal under the laws of Illinois.

A. "Receiving money knowing the same to have been fraudulently obtained" is not criminal at common law in Illinois.

Stats. 7 & 8 of George IV.
Cahill's Ill. Rev. Statutes (1931), ch. 28, par. 1.

B. The alleged offense charged is not covered by the Illinois Receiving Statute.

Cahill's Ill. Rev. Statutes (1931), ch. 38, par. 508.
People v. *Barnard,* 327 Ill. 305, 308.
Murphy v. *People,* 104 Ill. 528, 533.
Cahill's Ill. Rev. Statutes (1931), ch. 38, par. 515.
Steward v. *People,* 224 Ill. 434, 443.
Cahill's Ill. Rev. Statutes (1931), ch. 38, par. 65.
People v. *Mendelson,* 264 Ill. 453, 457.

C. The alleged offense charged is not covered by the Illinois Fraudulent Conveyance Act.

Ewing v. *Runkle,* 20 Ill. 449.
Cahill's Ill. Rev. Statutes (1931), ch. 38, par. 294.
Illinois Laws of 1819, pp. 14, 216.
13 Eliz., Chapt. 5.
Behrens v. *Steidley,* 198 Ill. 303, 306.

(1) THE OFFENSES CONTEMPLATED BY THE ILLINOIS FRAUDULENT CONVEYANCE ACT AND THE ENGLISH RECEIVING STATUTE ARE ENTIRELY DIFFERENT IN SUBSTANCE.

Grattan v. *State,* 71 Ala. 344.
Regina v. *Smith,* 6 Cox Criminal Law Cases, 31.

13 Eliz., Chapt. 5, Sec. 2.
Stats. 7 and 8 of George IV.
Law of Property Act of 1925, Sec. 207.
Law of Property Act of 1925, Sec. 172.
Cahill's Ill. Rev. Statutes (1931), ch. 38, par. 294.
Larceny Act of 1916, Sec. 33.

(2) EXTRADITION CANNOT BE GRANTED FOR A VIOLATION OF THE FRAUDULENT CONVEYANCE ACT, AS THAT OFFENSE IS NOT CRIMINAL IN ENGLAND NOR IS IT COVERED BY THE EXTRADITION TREATIES.

Law of Property Act of 1925, Sec. 207.

D. The complaint fails to charge the commission of acts which would constitute any offense under any other statute or law in force in Illinois.

(1) THERE IS NO STATE OR FEDERAL STATUTE MAKING CRIMINAL IN ILLINOIS THE ACTS CHARGED IN THE COMPLAINT.

U. S. C. A., Title 18, Sec. 467.
U. S. C. A., Title 18, Sec. 451.
U. S. C. A., Title 18, Sec. 468.
Pettit v. *Walshe*, 194 U. S. 205, 217.

IV.

The case of Kelly v. Griffin, 241 U. S. 6, is not authority for the proposition that "receiving money knowing the same to have been fraudulently obtained" is a crime in Illinois.

The decision in that case was not based on the Fraudulent Conveyance Act, but on other statutes entirely inapplicable here.

Kelly v. *Griffin*, 241 U. S. 6.
Cohens v. *Virginia*, 6 Wheaton 264, 399; 19 U. S. 264, 399.

U. S. v. *Wong Kim Ark,* 169 U. S. 649, 678.
Weaver v. *Palmer Bros. Co.,* 270 U. S. 402, 413.
The Jason, 225 U. S. 32, 53.
Bramwell v. *U. S. Fidelity Co.,* 269 U. S. 483, 489.
Bailey v. *Baker Ice Machine Co.,* 239 U. S. 268, 272.

V.

A new Extradition Treaty, known as the Dawes-Simon Treaty of 1932 came into force in the United States with the proclamation of the President August 9, 1932 and in express language abrogated all prior Extradition Treaties between the United States and Great Britain.

Doe v. *Braden,* 57 U. S. (16 How.) 635, 656, 657.
U. S. v. *Minnesota,* 270 U. S. 181, 201-2.
Terlinden v. *Ames,* 184 U. S. 270.
Anchor Line v. *Aldridge,* 280 Fed. 870.
15 R. C. L. 154, note 4.
Haver v. *Yaker,* 76 U. S. 32, 34.
Halsbury's Laws of England, (2d ed. 1932), Vol. 6, p. 521.
Hansard's Debates, CLXIV, 788.
197 Parliamentary Debates, 701.
Blackstone Commentaries I, ch. XVII, sec. 2.
Kent's Commentaries, Vol. 1, p. 166 (ed. 1873).
Chitty's Statutes, (6th ed.) Vol. 4, pp. 729, 730.
Biron & Chalmers on Extradition, (1903) p. 6.
Halsbury's Laws of England, (2d ed. 1932), Vol. 6, p. 519.
U. S. Constitution, Art. VI, sec. 2.
Howell v. *Bidwell,* 124 Fed. 688.
U. S. C. A., Title 18, Secs. 651, 653.
Clarke on Extradition, (4th ed. 1903), pp. 128, 51, 52.
Opinions of the Attorney General of the U. S., Vol. 4, p. 201.

Charlton v. *Kelly*, 229 U. S. 447, 472-3, 476.
Terlinden v. *Ames*, 184 U. S. 270.
Geofroy v. *Riggs*, 133 U. S. 258, 270, 271.
Santovincenzo v. *Egan*, 284 U. S. 30.
The Amiable Isabella, 19 U. S. 1.
50 Corpus Juris 870.
Words and Phrases, Vol. 6, p. 5841.

VI.

The Dawes-Simon Treaty of 1932 renders the mittimus under which appellee is sought to be detained and all proceedings under the Treaty of 1842 and the Convention of 1889 null and void.

A. Abrogation and repeal of all prior extradition treaties between the United States and Great Britain nullifies all proceedings taken thereunder which are in any manner pending. Extradition proceedings are quasi criminal.

In re Peggy, 5 U. S. 103, 110.
La Republique Francaise v. *Schultz*, 57 Fed. 37, 40.
Martin v. *Hunter's Lessee*, 14 U. S. 304, 370.
Whitney v. *Robertson*, 124 U. S. 190, 194.
Devlin, Treaty Making Power, p. 196.
Chae Chan Ping v. *U. S.*, 130 U. S. 581.
Grin v. *Shine*, 187 U. S. 181, 187.
Charlton v. *Kelly*, 229 U. S. 447, 460.
Benson v. *McMahon*, 127 U. S. 457, 462, 463.
Extradition of Mertz, 52 F.(2d) 241.
25 R. C. L. 942.
Ex Parte Larkins, 1 Okla. 53; 25 Pac. 745.
The Rachel, 10 U. S. 328.
United States v. *Stafoff*, 260 U. S. 477.
Naylor v. *City of Galesburg*, 56 Ill. 285.
23 L. R. A. (U. S.) 243.
Board of Public Utilities Commissioners v. *Compania General*, 249 U. S. 425, 426.

Fong Yue Ting v. *United States*, 149 U. S. 698.
In re Strobel's Estate, 39 N. Y. Supp. 169.
United States v. *Tynen*, 78 U. S. 88.
Norris v. *Crocker*, 54 U. S. 429.
The Vestris, 53 F.(2d) 847.
Day v. *City of Clinton*, 6 Ill. App. 476.

(1) EXTRADITION PROCEEDINGS AGAINST PETITIONER AND THIS HABEAS CORPUS BASED THEREON WERE PENDING AT THE TIME THE DAWES-SIMON TREATY CAME INTO FORCE.

U. S. C. A., Title 18, Sec. 653.
U. S. C. A., Title 18, Sec. 651.
Benson v. *McMahon*, 127 U. S. 457, 462, 463.
Mensevich v. *Tod*, 264 U. S. 134, 137.

VII.

The proceeding for petitioner's extradition cannot be maintained for the reason that Article X of the Webster Ashburton Treaty of 1842 and the Convention of 1889 have been expressly abrogated, and the Dawes-Simon Treaty does not include as an extraditable offense the charge made against your petitioner.

Convention of 1889, Par. 3, Sec. 1.
Dawes-Simon Treaty of 1932, Article 3, par. 18.

A. Doctrine of ejusdem generis applies to Dawes-Simon Treaty of 1932.

United States v. *Stever*, 222 U. S. 167, 174.
United States v. *Salen*, 235 U. S. 237, 249.
In re Cohen, 8 Ontario Law Reports, 143.
In re Rosen, 2 Western Weekly Reports, (1931), 799.
First National Bank of Joliet v. *Adam*, 138 Ill. 483.

ARGUMENT.

I.

An offense, to be extraditable, must be (1) Enumerated in the Treaty, (2) Made criminal by the laws of the Demanding Government, and (3) One for which the accused could be held for trial in the state in which he is found.

In 1842 the United States and Great Britain entered into a Treaty, known as the Webster-Ashburton Treaty of 1842 Article X of which pertained to extradition. Said Article X provided as follows:

> "It is agreed that Her Brittanic Majesty and the United States shall, upon mutual requisitions by them, or their Ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other: *Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed;* * * *" (Italics ours.)

In 1889 the two governments entered into a supplemental Convention, known as the Blaine-Pauncefote Convention which was amendatory of Article X of the Treaty of 1842 in that it extended the provisions of Article X to a number of offenses not included in the Treaty of 1842, among which

was "receiving any money, valuable security or other property knowing the same to have been embezzled, stolen or fraudulently obtained."

The general principle of international law that in all cases of extradition the offense for which extradition is sought must be a crime in the place where the accused is found, as well as in the place where the offense is alleged to have been committed, is incorporated in each of the extradition treaties entered into between the United States and Great Britain. This rule of law has been followed in each instance where the question has been raised in this Court.

In the case of *Wright* v. *Henkel*, 190 U. S. 40, in which the accused was charged with the commission of the crime of "fraud as a director of a company," under the Convention of 1889, this Court said (pp. 58, 61):

> "The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties, * * * The offence must be 'made criminal by the laws of both countries.' * * * when by the law of Great Britain, and by the law of the State in which the fugitive is found, the *fraudulent acts charged* to have been committed are made criminal, the case comes fairly within the treaty, * * * " (Italics ours.)

In *Collins* v. *Loisel*, 259 U. S. 309, brought under the Convention of 1889, in which Collins was charged with having obtained property by false pretenses, this Court said (p. 311):

> "It is true that an offense is extraditable only if the *acts charged* are criminal by the laws of both countries." (Italics ours.)

In the case of *Pettit* v. *Walshe*, 194 U. S. 205, this Court said (p. 217):

> "But as there are no common law crimes of the United States, and as the crime of murder, as such, is not known to the National Government, except in places over which it may exercise exclusive jurisdiction, the better construction of the treaty is, that the required evidence as to the criminality of the *charge* against the accused must be such as would authorize his *apprehension and commitment for trial in that State of the Union in which he is arrested.*" (Italics ours.)

The same principle is clearly stated in the cases of *Kelly* v. *Griffin*, 241 U. S. 6; *United States* v. *Rauscher*, 119 U. S. 407; *Benson* v. *McMahon*, 127 U. S. 457; and *In re Frank*, 107 Fed. 272.

The principle is also recognized by the majority opinion, as well as by the dissenting opinion, of the Judges of the United States Circuit Court of Appeals, and by the District Court and Commissioner in the instant case. It is also the rule which has been followed without exception in the English and Canadian cases and is expressly provided in the Extradition Act of Great Britain. (*In re Anderson*, 11 Upper Canada Common Pleas Reports 2; *In re Windsor*, 6 Best & Smith's Rep. (England) 522; Vol. 4, Chitty's Statutes, 6th Ed., p. 729.

II.

Unless the complaint in an extradition proceeding charges an extraditable offense as hereinbefore defined, the Comsioner is without jurisdiction and all proceedings thereunder and warrants based thereon are void.

Section 651, Chapter 20, of the United States Code Annotated, Title 18, which is the first section of the Act known as the Extradition Act of the United States, provides:

> "Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, or commissioner * * * may, upon *complaint made under oath, charging any person* found within the limits of any State, District, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person *so charged,* that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence *sufficient to sustain the charge under the provisions of the proper treaty or convention,* he shall certify the same, * * *." (Italics ours.)

The unvarying rule, as laid down by this Court and followed by the subordinate federal courts, is that in order to have extradition from the United States to Great Britain a complaint must be filed which charges an offense made criminal by a law of the United States applicable where the accused is found, or by a law of the state where the accused is found. It is thus necessary, in order to have extradition against your petitioner in the instant case, that the offense with which he is accused, that is, "receiving money knowing the same to have been fraudulently obtained," be made criminal by some law in force

in the State of Illinois, as it was in the jurisdiction of the State of Illinois that the complaint was filed and petitioner voluntarily submitted himself to arrest. The complaint is the basis upon which jurisdiction of the Extradition Commissioner depends. If the charge in the complaint is inadequate to confer jurisdiction upon the commissioner, this fact vitiates the entire proceeding.

Section 10 of the British Extradition Act of 1870 (Vol. 4, Chitty's Statutes, 6th Ed., p. 733) provides:

> "In the case of a fugitive criminal accused of an extradition crime, * * * if * * * such evidence is produced as * * * would *according to the law of England,* justify the committal for trial of the prisoner *if the crime of which he is accused had been committed in England* the police magistrate shall commit him to prison, but otherwise shall order him to be discharged." (Italics ours.)

In the case of *In re Windsor,* 6 Best & Smith's Report, 522, (England), extradition of a fugitive to New York was refused on habeas corpus because the charge made against him, although defined to be forgery in New York, did not constitute forgery in England. The Court said:

> "We have only power to surrender under statutes 6 and 7 Victoria C. 76, which does not say that all criminals are to be given up, but that for some specified crimes they may. * * * The crimes thus specified are those defined in the treaty previously entered into by the two high contracting parties. The *charge* against the applicant is, that being a clerk in a bank he * * * made an entry in a book stating on his behalf that a certain quantity of specie was deposited in a vault, that statement being false. But that is not equivalent to forgery. * * * It is true the statute of New York says that such conduct shall be deemed forgery * * * but then does the New York statute saying this make him guilty of forgery within the meaning of the Extradition Act? Two very high contracting parties made a treaty on which the Extradition Act is founded;

but we must construe that treaty according to the words used by them when thoroughly understood, especially when we find both peoples speaking the same language. The meaning of the New York Statute is that the party shall be punished as if for forgery." (Italics ours.)

The rule is well stated in the case of *In re Latimer,* 10 Canadian Criminal Cases, 244, where it is said:

"So far as the offense *charged is concerned, with which we only have to do in connection with these matters,* it is to my mind, perfectly clear that the offense *charged in the information* is one within the criminal law of Canada, the extradition treaty and the criminal law of the state of Pennsylvania, which brings us to the fifth point as to whether the *evidence* adduced in this case substantiates, in the manner provided by statute, the *charge which has been laid.*" (Italics ours.)

This same rule is laid down in *In re John Anderson,* 11 Upper Canada Common Pleas Reports 2.

The rule that the offense charged in the complaint must be criminal in the State of Illinois in order to confer jurisdiction upon the commissioner has been recognized by each court which has heard this case, and indeed the majority opinion of the Circuit Court of Appeals, although it reversed Judge Carpenter's order of discharge, has this to say in connection with this point:

"It is contended for appellants * * * that in this case it is sufficient that the acts charged were criminal by the laws of England. In line with this contention it is further maintained that the above quoted provision of Article X of the Treaty of 1842 has application not to the crime itself as necessarily an offense under the laws of both countries, but only to the *evidence* of criminality whereby apprehension and commitment for trial of the alleged criminal for a crime committed in the asylum country would be justified.

> However plausibly or even convincingly these contentions are supported, an insuperable obstacle to our acceptance of them is the fact that the United States Supreme Court has held otherwise. *Collins* v. *Loisel,* 259 U. S. 309; *Kelly* v. *Griffin,* 241 U. S. 6; *Wright* v. *Henkel,* 190 U. S. 40."

It is true that the law does not require that the crime charged in the extradition complaint be described by the same name in the two countries, nor that the scope of liability shall be co-extensive. (*Collins* v. *Loisel,* 259 U. S. 309.) "Absolute identity in the two countries is not required." (*Wright* v. *Henkel,* 190 U. S. 40.) It is necessary, however, that the essential elements of the acts charged in the complaint be made criminal both in the jurisdiction of the demanding country and the jurisdiction of the state in which the accused is found. The act charged in the instant case must be made criminal not only by the statute of the Demanding Government but by some statute in force in the State of Illinois. (*Wright* v. *Henkel,* 190 U. S. 40.) The particular variety of *crime charged* must be recognized as criminal in both jurisdictions. (*Kelly* v. *Griffin,* 241 U. S. 6; *Pettit* v. *Walshe,* 194 U. S. 205.)

The simple test as to whether or not extradition can take place from Illinois to Great Britain in the instant case is to answer the question; Could the accused be indicted and held for trial in the State of Illinois for "receiving property knowing the same to have been fraudulently obtained"? It is stated in *Pettit* v. *Walshe,* 194 U. S. 205, in referring to the applicable provisions of Article X of the Treaty of 1842 (p. 217):

> "As applied to the present case, that stipulation means that the accused, Walshe, could not be extradited under the treaties in question, except upon such evidence of criminality as, under the laws of the State of Indiana—the place in which he was found—would

justify his apprehension and commitment for trial if the *crime alleged* had been there committed." (Italics ours.)

We turn, therefore, to a consideration of the question of whether or not the petitioner could have been legally indicted, apprehended and committed for trial in the State of Illinois on a charge of "receiving money knowing the same to have been fraudulently obtained."

III.

The complaint in this cause does not charge petitioner with an extraditable offense for the reason that "receiving money knowing the same to have been fraudulently obtained" is not criminal under the laws of Illinois.

A. "Receiving money knowing the same to have been fraudulently obtained" is not criminal at common law in Illinois.

It is conceded that the alleged offense charged is not a crime at common law in Illinois. "Receiving money knowing the same to have been fraudulently obtained" was not made criminal in England until the year 1827 (Statutes 7 & 8 of George IV), and only the common law of England prior to the fourth year of James I (1606) has been adopted as the common law of Illinois. (Cahill's Ill. Rev. Stats. (1931), Chap. 28, Par. 1.)

B. The alleged offense charged is not covered by the Illinois Receiving Statute.

The only Illinois statute condemning the receipt of the proceeds of a crime is paragraph 507, Chapter 38, Cahill's Illinois Revised Statutes (1931). This section provides:

> "Every person, who, * * * shall * * * receive * * * stolen goods, or anything the stealing of which is de-

> clared to be *larceny,* or property obtained by *robbery or burglary,* knowing the same to have been so obtained, shall be imprisoned * * *." (Italics ours.)

The Illinois Supreme Court has on several occasions expressly held that obtaining property by fraud is not larceny. *People* v. *Barnard,* 327 Ill. 305, 308; *Murphy* v. *People,* 104 Ill. 528, 533.

The crime of robbery of course includes elements of force and intimidation which are not present in a fraudulent obtaining of property. Cahill, Illinois Revised Statutes (1931), ch. 38, par. 515; *Steward* v. *People,* 224 Ill. 434, 443.

In burglary there must have been a wilful, malicious, and forcible entering of a building. Cahill, Illinois Revised Statutes (1931) ch. 38, par. 65; *People* v. *Mendelson,* 264 Ill. 453, 457.

Obviously this Illinois statute, then, cannot cover the receiving of money which has been obtained by fraud.

C. The alleged offense charged is not covered by the Illinois Fraudulent Conveyance Act.

The Illinois Fraudulent Conveyance Act is wholly inapplicable to the alleged offense charged against the petitioner and we would not discuss it except for the reason that Judge Landis of the United States District Court for the Northern District of Illinois mentioned the Act as applicable in the case of *Kelly* v. *Griffin* which subsequently reached this Court and is reported in 241 U. S. 6, which case is discussed under Point IV of this brief. Main reliance has also been placed thereon by the Demanding Government in the instant case.

Both the Illinois criminal and civil statutes on fraudulent conveyances were adopted in substantially their present form in 1819. (Laws of 1819, pp. 14, 216.) As was

said by the Commissioner (R. 75) "this statute (the Illinois Fraudulent Conveyance Act) is substantially declaratory of the common law of England and is practically identical with the statute of 13 Eliz., c. 5." (See *Ewing* v. *Runkle,* 20 Ill. 449.) The statute of 13 Eliz., c. 5, passed in 1571, was the first English statute relating to fraudulent conveyances. It included the substance of both the penal and civil provisions of the present Illinois acts.

Deleting much of the language of the Illinois Penal Fraudulent Conveyance Act (Chap. 38, Par. 294, Cahill's Ill. Rev. Stats. 1931) and reading only those portions which have strongest intendment against petitioner, the statute would read as follows:

> "Every person who shall be a party to a fraudulent conveyance made with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages or demands shall be fined not exceeding $1,000."

In order that the problem may be clearly presented let us analyze the elements of the offense with which petitioner is charged. He is accused of receiving money from *a corporation* which had previously obtained it from a third person by fraud, with knowledge of the manner in which his transferor had acquired it. The only fraud involved is that which the transferor to petitioner had practiced upon a third person before the transfer. There is no charge that the transfer to petitioner was made with the intent or for the purpose of delaying or hinderng creditors of the transferor.

Clearly the complaint here involved fails to charge an offense under the above statute. The essential element of the offense under that statute is the intent of the transferor and of the transferee in making the conveyance.

Nowhere does the complaint in this case purport to charge any intent whatsoever.

Counsel for the Demanding Government has claimed in the lower courts that the transferee's intent is immaterial and that it is sufficient to show that his act delayed or hindered claimants against the transferor. This contention is directly refuted by the statement of the Illinois rule with respect to the parallel civil Fraudulent Conveyance Act in the case of *Behrens* v. *Steidley*, 198 Ill. 303, at page 306:

> "We have repeatedly held that under our Statute of Frauds and Perjuries, in order to set aside a conveyance on the ground that it was made to hinder and delay creditors, it must appear that both parties participated in the fraud; and that the conveyance may have the effect to delay and hinder the creditors does not, of itself, bring a case within the statute. (*Ewing* v. *Runkle*, 20 Ill. 449; *Hessing* v. *McCloskey*, 37 *id.* 341.)"

The purpose of the civil Fraudulent Conveyance Act was to make it possible for creditors to set aside conveyances and transfers made by their debtors which, in the absence of the Act, would have been beyond reach of creditors. The Act obviously was not intended to apply to transfers which could be set aside without the aid of the Act, since in such cases it would be clearly superfluous. A transfer of property which has previously been fraudulently obtained made to a person having knowledge of the fraud, is subject to being attacked and set aside without the aid of the civil Fraudulent Conveyance Act, and that Act is inapplicable to such a transaction. The property in the hands of the transferee is still subject to the claims of the original owners in the same manner and to just as great an extent as it was while in the hands of the transferor, regardless of statute.

The Penal Fraudulent Conveyance Act was obviously passed solely for the purpose of putting teeth into the civil Act. The scope of the penal act is not larger than the scope of the civil Act. The transfer in which petitioner is charged with being a participant left the property in the hands of petitioner subject to the claims of the alleged original owners in the same manner and to as great an extent as it was while in the hands of petitioner's transferor.

(1) THE OFFENSES CONTEMPLATED BY THE ILLINOIS FRAUDULENT CONVEYANCE ACT AND THE ENGLISH RECEIVING STATUTE ARE ENTIRELY DIFFERENT IN SUBSTANCE.

The essence of the offense under the Penal Fraudulent Conveyance Act is the fraud caused by the transfer of the property, not fraud in the obtaining of it by the transferor. The manner in which the transferor may have previously obtained the property is entirely immaterial. In construing an Alabama statute making it a crime to make or receive a conveyance to defraud creditors, the Alabama Supreme Court, in the case of *Grattan* v. *State,* 71 Ala. 344, said that cases denounced by this section were not analogous to the offense of purchasing property belonging to another or receiving stolen property, as the offense under the Fraudulent Conveyance Act involved a disposition by one of property "which is presumably his own and not another's."

The essence of the offense of receiving property knowing the same to have been fraudulently obtained is the previous obtaining of the property by the transferor by means of fraud. The essence of the offense under the Fraudulent Conveyance Act—*i. e.,* the purpose and intent of the transfer—is entirely immaterial in a prosecution for receiving property knowing it to have been fraudulently obtained. In such a prosecution proof of the purpose or intent of

the transfer to the accused would not only be unnecessary, it would be irrelevant. Yet the entire gist of the offense under the Fraudulent Conveyance Act is that intent or purpose. Briefly these two acts are concerned with two entirely different frauds, the one an obtaining-fraud, and the other a conveying-fraud.

The preamble to the English statute on fraudulent conveyances (13 Eliz., c. 5) on which the Illinois Fraudulent Conveyance Act was based, recited that its purpose was to avoid and abolish "feigned" conveyances which were devised to defraud "creditors and others" of their "just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs." It was not intended to prevent the obtaining of property by false pretenses nor to punish one for receiving property which another had obtained by false pretenses. The language of the fraudulent conveyance statutes, both civil and criminal, obviously is aimed at a fake or feigned conveyance which is made by one to cut off the interest which another has in the property conveyed, or to prevent the other from satisfying some debt out of the property. The substance of the offense under the Conveyance Act is the fake or feigned conveyance by the debtor. It looks to the future. The substance of the offense of receiving property knowing the same to have been fraudulently obtained is the prior obtaining of the property from the owner by fraudulent pretenses. It looks to the past.

The English Fraudulent Conveyance Act (13 Eliz., c. 5) was adopted in 1571. It was not until 1827 that the first English statute making it a crime to receive property knowing the same to have been fraudulently obtained was adopted (Stats. 7 and 8 of George IV). The statute of 13 Eliz., c. 5, was repealed by Section 207 of the Law of Property Act of 1925. The criminal provision of the Act is omitted in the substituted statute (Sec. 172, Law of Property Act of 1925). Since 1925 there has been no penal

provision in England comparable with Paragraph 294 of Chapter 38 of the Illinois statutes (Fraudulent Conveyance Act). It is significant that for approximately 100 years there existed simultaneously in England the penal provision of the Fraudulent Conveyance Act (Sec. 2 of 13 Eliz., c. 5) and the English statute on receiving property knowing it to have been obtained by criminal means (Sec. 33 of Larceny Act of 1916 and antecedent statutes). During these 100 years when both statutes were in force there were prosecutions under the English Fraudulent Conveyance Act for the making of fraudulent conveyances. (*Regina* v. *Smith*, 6 Cox Criminal Law Cases, 31 (1852)—a pioneer case.) There were also prosecutions under the larceny receiving statute for receiving property knowing that the transferor had obtained it by fraudulent means. Yet a study of the English legal digests discloses not a single instance where anyone was so irrational as to institute a prosecution under the Conveyancing Act for receiving goods with knowledge that they had been obtained fraudulently by the transferor, or a prosecution under the larceny receiving act for participating in a fraudulent conveyance. The simultaneous existence of these two statutes in England clearly indicates that they were not intended to cover the same offense.

(2) EXTRADITION CANNOT BE GRANTED FOR A VIOLATION OF THE FRAUDULENT CONVEYANCE ACT, AS THAT OFFENSE IS NOT CRIMINAL IN ENGLAND NOR IS IT COVERED BY THE EXTRADITION TREATIES.

If the petitioner herein were charged with being a party to a fraudulent conveyance and were erroneously extradited therefor it would be impossible to try him for that offense in England, since the penal provisions of the English Fraudulent Conveyance Act have been repealed, as has already been pointed out. (Law of Property Act of 1925, Sec. 207.)

Regardless of the existence or non-existence of a Fraudulent Conveyance Act in both countries, it has never been an extraditable offense to be a party to a fraudulent conveyance, as this is not one of the crimes enumerated in the treaties between the United States and Great Britain.

D. The complaint fails to charge the commission of acts which would constitute any offense under any other statute or law in force in Illinois.

(1) THERE IS NO STATE OR FEDERAL STATUTE MAKING CRIMINAL IN ILLINOIS THE ACTS CHARGED IN THE COMPLAINT.

During the hearing before the commissioner, an opportunity was offered both sides to call such expert witnesses on the criminal law of Illinois as they saw fit, limiting the number, however, to five on each side. This opportunity was granted by the commissioner in the exercise of his discretion in relation to judicial notice. Petitioner called five men whom he considered to be among the best informed on the subject in the State of Illinois; one former justice of the Supreme Court of Illinois, one present and one former chief justice of the Criminal Court of Cook County, Illinois, and two indictment experts in the office of the State's Attorney for Cook County, Illinois. Each testified that "receiving property knowing the same to have been fraudulently obtained" is not made criminal by any statute or other law in force in the State of Illinois. (R. 539-589.) The same opportunity was afforded to the Demanding Government. It cross examined each of petitioner's witnesses but called not a single witness in its own behalf.

The contention was made by the Demanding Government before the Circuit Court of Appeals that certain federal statutes covered the offense charged in the complaint.

These statutes were held by that Court to be inapplicable, but counsel again advances them in his reply to the petition for writ of certiorari herein. The principal federal statute relied upon is Section 467 of Title 18, U. S. C. A., which makes it a crime to receive property "feloniously taken, stolen, or embezzled." This statute is one section of Chapter 11 of the federal criminal code, which chapter applies only to "offenses within admiralty, maritime and territorial jurisdiction of the United States" and is specifically exempted from territory within the jurisdiction of a state of the Union. (U. S. C. A., Title 18, Sec. 451.) As it is not a federal statute in force in Illinois, petitioner could not have been held for trial under it in this state, and nothing contained in it can have any bearing upon the question of whether or not the complaint in this case charges the commission of acts which are criminal in Illinois. *Pettit* v. *Walshe,* 194 U. S. 205, 217.

An additional federal statute that has been advanced is Section 468 of Title 18, U. S. C. A., which adopts for federal territory *not under* state jurisdiction the penal laws of the state or territory within which the federal territory is located. The argument evolved from this statute is that the federal receiving statute above mentioned (U. S. C. A., Title 18, Sec. 467) makes it criminal to receive property where the original obtaining of the property was in violation of any Illinois statute. Here again both federal statutes are limited to territory outside the jurisdiction of the State of Illinois and have no bearing on the criminal law in force in the state.

The Circuit Court of Appeals below held both these statutes inapplicable.

After reviewing the various statutes advanced by counsel for the respondent, Judge Carpenter of the District Court stated (R. 55):

> "No statute has been produced, in the judgment of the court, making it a crime (in Illinois). * * * I am

of the opinion that there is no law in the State of Illinois similar to or substantially the same, making it a crime such as was defined in the jurisdiction of the demanding government."

Judge Evans, in his dissenting opinion in the Circuit Court of Appeals, stated (R. 1180):

"Appellee has the right to ask, What is the Illinois statute which makes it an offense against the laws of Illinois to do the acts with which he is charged? For appellants with commendable frankness admit that the offense charged was not a crime at common law. * * * The offense charged against appellee, which apparently is a criminal offense in England, is at most a species of the genus—fraud. It exists, if at all, only because a statute makes it a criminal offense. *Waiving to one side all rules which necessitate a strict construction of the criminal statutes, the stubborn fact which confronts us is that no Illinois statute has been found which makes it a criminal offense to do the acts charged against appellee.*" (Italics ours.)

IV.

The case of Kelly v. Griffin, 241 U. S. 6, is not authority for the proposition that "receiving money knowing the same to have been fraudulently obtained" is a crime in Illinois.

The decision in that case was not based on the Fraudulent Conveyance Act, but on other statutes entirely inapplicable here.

In the case of *Kelly* v. *Griffin,* 241 U. S. 6, Kelly was charged with several offenses which are entirely immaterial here: perjury, obtaining money by false pretenses, stealing and embezzlement. He was extradited for perjury, obtaining money by false pretenses and receiving money of the *government* from *government* officials knowing that

they had obtained it by fraud The only relevant charge is the last contained in the complaint. The exact language of this charge, deleted of extraneous material, was:

> "that said Thomas Kelly * * * did also unlawfully receive money, valuable securities or other property *belonging to His Majesty the King* in the right of the Province of Manitoba which had theretofore been embezzled, stolen or fraudulently obtained by means of an unlawful and fraudulent conspiracy entered into between said Thomas Kelly, Sir Rodmond P. Roblin, *then and there Premier* of the Province of Manitoba, Walter H. Montague, *then and there Minister of Public Works,* James H. Howden, *then and there Attorney General,* George R. Coldwell, *then and there acting Minister of Public Works and Minister of Education,* R. M. Simpson, Victor W. Horwood, *then and there Provincial Architect,* * * * to defraud *His Majesty the King* in the right of the Province of Manitoba out of large sums of money * * *." (Italics ours.) (Page 41 of Printed Transcript of Record in the case of *Kelly* v. *Griffin* in this Court.)

Stated simply, the charge was that Kelly received *government* money which had been embezzled, stolen or fraudulently obtained from the *government* by *government officers.*

The statement by Mr. Justice Holmes in the opinion of this court in the *Kelly* case that "the receiving of property known the same to have been fraudulently obtained is a crime by the laws of both Canada and Illinois" (p. 15) has been cited by counsel as controlling on the lower federal courts regardless of the non-existence of any statute making such act criminal in Illinois.

In support of this charge, the Demanding Government in the *Kelly* case relied upon three sets of statutes: Canadian, Federal and Illinois.

The Canadian statutes relied upon were Sections 347, 359 (*c*), 399, 400 and 402 of the Canadian Criminal Code. Section 347 defined stealing to include fraudulent taking or

converting. Section 359 (*c*) made it an "indictable offense" for a *government officer* to steal any *government property* in his possession. Section 399 made it a crime to receive property obtained by means amounting to an indictable offense. Section 400 made it a crime to receive property known to have been stolen. Section 402 defined the time when receiving is complete. Each of these statutes was quoted in full (Kelly Brief 54-55). No Canadian Fraudulent Conveyance Act was mentioned.

The Illinois statutes quoted in the government's brief were sections 167, 74, 80 and 239 of chapter 38 of the Revised Statutes of Illinois. Section 167 (now paragraph 380, chapter 38, Cahill's Ill. Rev. Stat. (1931)) defined larceny. Section 74 (now paragraph 186, chapter 38, Cahill's Ill. Rev. Stat. (1931)) provided that whoever embezzled or fraudulently converted should be deemed guilty of larceny. Section 80 (now paragraph 192, chapter 38, Cahill's Ill. Rev. Stat. (1931)) provided a punishment for any government officer who "embezzles or fraudulently converts to his own use or *fraudulently takes*" (italics ours) *government moneys*. Section 239 (now paragraph 507, chapter 38, Cahill's Ill. Rev. Stat. (1931)) made it a crime to receive anything obtained by larceny. Each of these statutes was set out in full (Kelly Brief 55-56). Immediately following these quotations from the Illinois Statutes the demanding government's brief stated (Kelly Brief 57):

> "(See also Section 142, Chapter 38, Revised Statutes of Illinois, which makes criminal among other things any *contract* made with *intent to deceive and defraud.*)
>
> "It is contended that none of these provisions to the Illinois Statutes are here shown by the evidence to have been violated.
>
> "But even if this were true (which we do not by any means admit), the evidence here shows a clear violation of Section 5438 and Section 5497 of the Revised Statutes of the United States."

The statute referred to in parentheses, section 142 of chapter 38, was the Illinois Fraudulent Conveyance Act.

The two federal statutes mentioned in the quotation above were set forth immediately thereafter. Section 5438 made it criminal to obtain money from the *government* by fraud or conspiracy to defraud, and section 5497 made it unlawful to receive government money from a *government* officer otherwise than in payment of a *government* debt.

It is apparent that counsel for the demanding government in the *Kelly* case did not consider the Illinois Fraudulent Conveyance Act to be the applicable Illinois statute, or that Act certainly would have been given more prominence. The language of the Fraudulent Conveyance Act was not quoted to this Court, nor was the Act referred to by name.

The opinion of this Court in the *Kelly* case likewise contained no statement suggesting that this Court was relying upon the Fraudulent Conveyance Act. That this Court had in mind the *government-fraud* and *government-officer* limitations in the crime charged in the *Kelly* case is apparent from the statement of the issues in the early part of the opinion (p. 13) and the discussion of this charge at the close of the opinion (p. 15). This Court there stated:

> "It may be assumed that there is no evidence of larceny or embezzlement as (commonly) defined, * * *."

Mr. Justice Holmes, who wrote the opinion, was apparently considering the unusual form of embezzlement covered by the *government-officer* statutes as distinguished from embezzlement as "commonly defined." Shortly following this statement, Mr. Justice Holmes continued:

> "There may be a doubt whether the appellant, if a party to the fraud, received the *money of the Government,* directly from it, or through a third hand so as to be guilty *under this count of the complaint.*" (Italics ours.)

Thus Mr. Justice Holmes clearly recognized that he was dealing with a charge of receiving *government money* from *government officials* knowing that they had previously obtained it from the *government* by fraud.

Both Judge Carpenter in the District Court and Judge Evans in the Circuit Court of Appeals analyzed the *Kelly* case; they saw that the charge in the Kelly complaint was entirely different from the charge in the present case, that counsel for the demanding government in the *Kelly* case realized the peculiar nature of the offense charged when they quoted to the Court only statutes claimed by them to relate to receiving *government money* from *government officers,* and that this Court was considering this limited nature of the offense when it held Kelly for extradition on this charge.

The majority of the Circuit Court of Appeals refused to consider these differences and held themselves bound by the broad statement of Mr. Justice Holmes disassociated from the issue before him.

It has, since the early days of Chief Justice Marshall, been recognized without exception that expressions in an opinion are to be limited to the issues before the court rendering the opinion. A statement in an opinion often is broader than it need be for the decision of the particular case, but such statement cannot be adopted as applicable in a subsequent case unless the issues are *identical* with those before the court in the former decision. This rule has become so well settled that it is customarily referred to as a maxim. *Cohens* v. *Virginia,* 6 Wheaton 264, 399; 19 U. S. 264, 399; *United States* v. *Wong Kim Ark,* 169 U. S. 649 at p. 678; *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402, 413; *The Jason,* 225 U. S. 32, 53; *Bramwell* v. *U. S. Fidelity Co.,* 269 U. S. 483, 489; *Bailey* v. *Baker Ice Machine Co.,* 239 U. S. 268, 272.

In the *Kelly* case, Mr. Justice Holmes made a broad statement in regard to the law of Illinois. That statement

if disassociated from the balance of the opinion and from the issue presented to the court in that case would not be a correct statement of the law in Illinois.

When the whole opinion of Mr. Justice Holmes and the record are examined it appears that the court was concerned with an offense entirely different from the alleged offense charged in the instant case.

Judge Evans and Judge Carpenter held the *Kelly* case to be clearly distinguishable from the case at bar and therefore not applicable here.

Mr. Justice Evans, said (R. 1180):

> "The facts in the *Kelly* case may be distinguished in material respects from the facts in this case. Restricting the holding to the actual facts disclosed, that decision may be distinguished."

Judge Carpenter after quoting the language in question in the *Kelly* case, said in part (R. 54):

> "That is a very broad statement, *but it is subject to the limitation of the very issues which the Supreme Court had before it.* * * * The reliance was placed *upon different statutes,* and *Mr. Justice Holmes,* in disposing of the case, when he used the language that 'the receiving of property known to have been fraudulently obtained, is a crime by the laws both of Canada and of Illinois' *must have meant on the facts in that case, money fraudulently obtained from or by a public official,* and received by some person knowing of that fraud." (Italics ours.)

Obviously the issue here cannot be the same as that which was before the Supreme Court in the *Kelly* case, as there is no charge in the present case either that *government money* was taken or that any money was received from a *public official.* Neither the charge in the complaint *nor the statutes cited* to the court in the *Kelly* case cover

the alleged offense charged against petitioner, and the broad statement of Mr. Justice Holmes has no applicability to the case at bar.

V.

A new Extradition Treaty, known as the Dawes-Simon Treaty of 1932 came into force in the United States with the proclamation of the President of August 9, 1932, and in express language abrogated all prior Extradition Treaties between the United States and Great Britain.

The Dawes-Simon Treaty of 1932 between the governments of the United States and Great Britain was signed by the respective plenipotentiaries in London on December 22, 1931. (R. 1225, 1234.) Ratification was advised by the Senate of the United States on February 19, 1932. (R. 1225, 1250-1262.) It was ratified by the President of the United States on March 3, 1932. (R. 1225, 1234-1235.) King George of Great Britain on the 29th day of July, 1932, approved, accepted, confirmed and ratified the treaty in the following language:

"* * *

"We, having seen and considered the Treaty aforesaid, have approved, accepted, and confirmed the same in all and every one of its Articles and Clauses, as We do by these Presents approve, accept, confirm, and ratify it; in respect of Our United Kingdom of Great Britain and Northern Ireland, for Ourselves, Our Heirs and Successors; engaging and promising upon Our Royal Word that We will sincerely and faithfully perform and observe all and singular the things which are contained and expressed in the Treaty aforesaid, and We will never suffer the same to be violated by any one, or transgressed in any manner, as far as it lies in Our power. For the greater testimony and validity of all which, We have caused Our Great Seal to be affixed to these Presents, which We have signed with our Royal Hand." (R. 1271.)

The formal exchange of ratifications (R. 1272) was made between the official representatives of the two governments in London on August 4, 1932.

Five days later, on August 9, 1932, the President of the United States formally proclaimed the new treaty. After reciting the ratifications by both governments and the exchange of such ratifications, the proclamation read:

> "Now Therefore Be It Known, that I, Herbert Hoover, President of the United States of America, have caused said Treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof." (R. 1234.)

Petitioner submits that the foregoing undisputed facts establish that the treaty came into full force and effect and became operative upon all individuals in the United States ten days after the proclamation of the President, or on August 19, 1932. The treaty had been duly approved and ratified by the President and Senate. Ratifications had been exchanged. The President had proclaimed the treaty as the law of the land. This was a conclusive and final determination of the existence of the treaty by those departments of the government in which the whole treaty-making power is vested by the constitution. It is well settled that the determination of the executive department, all of the formalities required by our constitution in the making of a treaty having been fulfilled, is conclusive that the treaty is in full force and effect in the United States. Any other rule would involve our foreign relations in intolerable embarrassment and endless confusion. As stated by Mr. Chief Justice Taney in *Doe* v. *Braden*, 57 U. S. (16 How.) 635, at 656, 657, where the court was asked to determine whether the King of Spain had power to make the treaty:

> "By the Constitution of the United States, the President has the power, by and with the advice and consent of the Senate, to make treaties provided two-thirds of

the Senators present concur. * * * And the Constitution declares that all treaties made under the authority of the United States shall be the supreme law of the land.

"The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.

"* * * It was for the President and Senate to determine whether the king, by the constitution and laws of Spain, was authorized to make this stipulation and to ratify a treaty containing it. They have recognized his power by accepting this stipulation as a part of the compact, and ratifying the treaty which contains it."

This rule has been consistently followed in all cases where a treaty, having been proclaimed to be in full force and effect by the executive department after compliance with all the formalities required by our constitution, has been attacked upon the ground that some action or non-action of the foreign nation rendered the action and proclamation of our executive department ineffective. *United States* v. *Minnesota*, 270 U. S. 181, 201-2; *Terlinden* v. *Ames*, 184 U. S. 270; *Anchor Line* v. *Aldridge*, 260 Fed. 870.

However, were the question open for review, notwithstanding the proclamation of the President after ratification by him and the Senate and exchange of ratifications, the conclusion that the treaty is in full force and effect in the United States would incontrovertibly follow from a

judicial examination of the undisputed facts hereinbefore recited.

A distinction exists between the question whether a treaty is binding and effective between the governments of the contracting nations and whether either nation has taken steps which may be necessary to implement the treaty and discharge the obligation of the treaty. Upon the exchange of ratifications the treaty became mutually binding upon the governments of Great Britain and the United States. See cases cited 15 R. C. L. 154, note 4.

In the case of *Haver* v. *Yaker*, 76 U. S. 32, this court stated in passing upon a Treaty with the Swiss Confederation (p. 34):

> "It is undoubtedly true, as a principle of international law, that, *as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature.* In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date." (Italics ours.)

The public ratification and approval of the treaty by the King of Great Britain and subsequent exchange of ratifications make the treaty binding upon the government of Great Britain. It is well settled that the treaty-making power in Great Britain is in the Crown. No ratification of an extradition treaty by parliament is required. Halsbury's Laws of England, 2nd Ed., (1932) Vol. 6, p. 521.

Lord Palmerston on the floor of Parliament on April 11, 1864, stated:

> "It is not the practice, nor is it in accordance with the principles of the Constitution, that the Crown should ask the advice of its Parliament with respect to engagements which it may be advised are proper to be contracted." (Hansard's Debates CLXXIV, 788.)

Lord Asquith, before the House of Commons, on November 26, 1908, made a statement to the same effect. (197 Parliamentary Debates, 701.)

In Blackstone (Commentaries I, ch. XVII, sec. 2), it is said:

> "It is the King's prerogative, to make treaties, leagues, and alliances with foreign States and Princes. For it is by the law of nations essential to the goodness of a league that it is made by the sovereign power, and then it is binding upon the whole community; and in England the sovereign power is vested in the person of the King. Whatever contracts, therefore, he engages in, no other power in the Kingdom can legally delay, resist, or annul. * * *".

Chancellor Kent said, (Commentaries, Vol. 1, p. 166, ed. 1873):

> "Treaties of peace, when made by the competent power, are obligatory upon the whole nation. If the treaty requires the payment of money to carry it into effect and the money cannot be raised but by an act of the legislature, the treaty is morally obligatory upon the legislature to pass the law, and to refuse it would be a breach of public faith."

Clearly the ratification by the King bound the British government. Counsel for appellee below sought to avoid this conclusion by the contention that an Order in Council under the Extradition Act of Great Britain is necessary to make the treaty binding upon the British government. The fallacy in this contention rests upon the failure to distinguish between what is necessary to make the treaty binding on the British government and what may be necessary to make the treaty operative on individuals found in Great Britain and thus provide the machinery for the discharge of the obligation of the British government under the treaty.

Section 2 of the British Extradition Act of 1870 which is the act in question opens with the following provision:

> "Where an *arrangement has been made* with any foreign state with respect to the surrender to such state of any fugitive criminals Her Majesty *may* by Order in Council, direct that this Act shall apply in the case of such foreign state." (Italics ours.) (Vol. 4, Chitty's Statutes, 6th Ed., pp. 729-730.)

A mere reading of this statute demonstrates (1) that it relates to the application of certain internal machinery to an arrangement or treaty already concluded and binding, and (2) it is an *optional* method of providing the machinery to implement the treaty.

This construction of the language of the act is further sustained by authority. In the English work of Biron & Chalmers on Extradition (1903) the binding effect of an extradition treaty on Great Britain without any parliamentary action is discussed as follows (p. 6):

> "Where these two functions (executive and legislative) of government are mutually independent, as in the United States of America, treaties made by the executive are binding upon the nation even when they touch the rights of the individual. But when the executive is dependent upon the Legislature, though it may enter into international engagements with other Powers which bind the nation through its government, it cannot trespass upon the rights of its own citizens against the State. Thus, in the case of *Walker* v. *Baird* (1892, A. C. 451), it was held that, in spite of a treaty between this country and France, which necessarily involved a particular course of action on the part of the Government of this country, a private individual whose rights were thereby prejudiced had a valid claim against those who carried it out."

For a clear understanding of the status of a treaty in Great Britain, the distinction between the binding effect of

the treaty on the government, as a contract between sovereigns, and the binding effect of the treaty on the rights of individuals, must be kept in mind. As stated in the above quotation a treaty may require some municipal law to put it into operation as to individual rights, but it is nevertheless, without that municipal law, binding on the government.

The latest authority found which discusses this distinction between the binding effect of a treaty on Great Britain as a government and the machinery for the internal operation of the treaty on individuals found in Great Britain, is Volume 6 of Halsbury's Laws of England, 2nd. Ed., 1932 (p. 519):

> "644. The subject of treaties is governed partly by international and partly by municipal law. International law regulates the relations of the sovereign or part sovereign States *inter se*, and so, according to the view of English law, determines the validity, the interpretation, and the enforcement of treaties as between the parties. Municipal law determines the attribution of the treaty-making power within the State and the effects of treaties upon persons within its allegiance."

On July 29, 1932, the King of Great Britain publicly ratified the treaty and pledged its faithful observance in every particular. Hence it is clear that after the exchange of ratifications the treaty was binding upon the governments of the United States and Great Britain and the obligation to take any steps necessary to make the treaty, already a binding obligation upon those governments, operative and effective on persons found in each country, rested upon the governments of the United States and Great Britain. It is certain that the necessary steps were taken by the United States; and whether they were taken in Great Britain does not affect the binding character of the treaty on the governments or its being in full force and effect in the United States.

In the United States the step necessary to make the treaty operative upon individuals found therein, was taken by the proclamation of the President. That was the publication of the treaty in the United States and made it in full force and effect there. The treaty then became the law of the land. Article VI, Section 2, U. S. Constitution; *Haver* v. *Yaker*, 76 U. S. 32; *Howell* v. *Bidwell*, 124 Fed. 688. The municipal law providing for its internal operation in the United States was already in existence. 18 U. S. C. A. 651, 653. The conclusion that the treaty thereby became the law of the land and fully operative in the United States was not affected by whether Great Britain did, or did not, in compliance with her treaty obligation, take the steps, if any were necessary, to make the treaty operative on individuals in that country.

The Webster-Ashburton Treaty of 1842 went into effect on October 13, 1842, when ratifications were exchanged. Some little time elapsed between that date and the date on which Parliament passed an act providing the municipal law for the operation of the treaty on persons found on English soil. (August 22, 1843.) No general extradition act similar to the Act of 1870 was then in effect. Sir Edward Clarke, in his work on Extradition (4th ed. 1903), said of this treaty (p. 128):

> "* * * the extradition clause of the Ashburton Treaty, which has already been quoted, while it took immediate effect in America and Canada, did not come into operation in England until August 1843, when the Act 6 & 7 Vict. c. 76, was passed."

During the period between the exchange of ratifications and the Act of Parliament the Attorney General of the United States was asked to pass upon the question of whether or not this Treaty of 1842 was in effect. Great Britain, through its "accredited minister" had requested the United States to surrender Christiana Cochrane, alleged to be a fugitive from Scotland, under the 1842 Treaty,

although no act of Parliament had been passed providing the machinery for making the Treaty operative upon persons found in Great Britain, which counsel now say is a prerequisite to the coming into force of any English extradition treaty. Both England and the United States considered the treaty to be in force and the fugitive was surrendered for trial in Scotland. (Clarke on Extradition, Fourth Edition, pp. 51-52.)

In sustaining the authority of the President of the United States to surrender this fugitive to Great Britain under this treaty, the Attorney General said (Vol. 4, p. 201, Opinions of the Attorney General):

> "* * * the convention has been duly concluded and ratified, as well on the part of Great Britain as of the United States. The ratifications have been interchanged, and *the treaty proclaimed.* It has been made under the authority of the United States, and is the supreme law of the land. It has prescribed, by its own terms, the manner, mode, and authority, in and by which it shall be executed. It has left nothing to be supplied by legislative authority, but has indicated means suitable and efficient for the accomplishment of its objects." (Italics ours.)

Moreover we are not concerned here with a refusal on the part of Great Britain to fulfill an obligation created by treaty. Our government has made no demand and it must be assumed that when it does Great Britain will perform its obligation. If, to do so, an Order in Council is required, she will procure it. This Court cannot indulge in judicial speculation as to whether or not Great Britain would find it convenient to respond when called upon.

Since, therefore, it must be assumed that if the United States should make a demand under the Dawes-Simon Treaty of 1932, Great Britain would comply, it follows that if Great Britain should refuse, the right and power to abrogate a treaty thus made voidable by nonperformance on one

side would rest in the power and discretion of the political department of the other party and would never rise to the character of a judicial inquiry. So long as the executive department fails to abrogate the treaty theretofore proclaimed as the law of the land, it continues in full force and effect. *Charlton* v. *Kelly*, 229 U. S. 447, 472-3, 476; *Terlinden* v. *Ames*, 184 U. S. 270.

Counsel for respondent also contended below that the Dawes-Simon Treaty was not in force and effect in the United States for supposed lack of publication in Great Britain. There are two answers to this contention. *First*, the true meaning of the language that the "treaty shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the high contracting parties" is that it shall become operative upon individuals in each country ten days after it shall have been published in such country. *Second*, if the publication claimed to be necessary to make the treaty operative in Great Britain were a condition precedent to its coming into force in the United States, such publication has been had.

It is elementary that words used in a treaty are to be given their ordinary meaning and are not to be construed in any artificial or special sense. *Geofroy* v. *Riggs*, 133 U. S. 258, 270, 271; *Santovincenzo* v. *Egan*, 284 U. S. 30; *The Amiable Isabella*, 19 U. S. 1. The ordinary meaning of the word "publication" as used in the Dawes-Simon Treaty is "to make known" to the public in any form prescribed by the laws of the high contracting parties. 50 C. J. 870; 6 Words and Phrases 5841. Obviously all that was required was that the treaty should be officially made known to the public by Great Britain in some manner authorized by the British law. When the King publicly ratified the treaty (R. 1262-71), already printed and made available to the public by His Majesty's Stationery Office (R. 1272), and pledged strict observance of all of the terms

of the treaty, the treaty requirement for publication under one of the forms of law of Great Britain was fully met. The power and authority of the King in the premises has not been and cannot be questioned. To hold that publication of an Order in Council under the British Extradition Act of 1870 was essential, would amount to a judicial amendment of the treaty to make it read that it should not go into force until publication of an Order in Council. This the courts will not do. *The Amiable Isabella,* 19 U. S. 1. Moreover, it is clear that an Order in Council under the British Extradition Act of 1870 is not the publication of a treaty, but merely a municipal order for the application of the machinery of the Act to an already existing treaty. Under its language even that method of providing the machinery to implement the treaty is optional. Clearly it cannot be said that publication by the public ratification of the King enjoining the observance of the treaty was contrary to British law; and hence it was a valid publication under one of the forms of law of Great Britain, if such a publication were required, as it was not, before the treaty could become operative upon individuals in the United States.

We have seen that the Dawes-Simon Treaty is in full force and effect in the United States. It requires no argument to demonstrate that the going into effect of that treaty abrogated prior treaties. The Dawes-Simon Treaty specifically provides that "On the coming into force of the present treaty, the provisions of Article 10 of the treaty of the 9th August 1842 of a convention of the 12th July 1889 of the supplemental convention of the 13th December 1900 and of supplemental convention of the 12th April 1905 relative to extradition shall cease to have effect." (R. 1234.)

VI.

The Dawes-Simon Treaty of 1932 renders the mittimus under which appellee is sought to be detained and all proceedings under the Treaty of 1842 and the Convention of 1889 null and void.

A. Abrogation and repeal of all prior extradition treaties between the United States and Great Britain nullifies all proceedings taken thereunder which are in any manner pending. Extradition proceedings are quasi criminal.

In the case of *In re Peggy,* 5 U. S. 103, Chief Justice Jay announced a rule of law from which there has been no departure, that the adoption of a treaty nullifies all proceedings taken and which are in any way still pending under prior law of the United States. This Court there said (p. 110):

> "It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. * * * In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside."

In the case of *Martin* v. *Hunter's Lessee,* 14 U. S. 304, Justice Johnson made the following statement in regard to a previous decision on the same case (11 U. S. 602) by the United States Supreme Court (p. 370):

> "The majority of this court determined, that, as a public law, the treaty was a part of the law of every

case depending in this court; that as such, it was not necessary that it should be spread upon the record, and that it was obligatory upon this court, in rendering judgment upon this writ of error, notwithstanding the original judgment may have been otherwise unimpeachable. And to this opinion, I yielded my hearty consent; for it cannot be maintained, that this court is bound to give a judgment, unlawful at the time of rendering it, in consideration that the same judgment would have been lawful, at any prior time. What judgment can now be lawfully rendered between the parties, is the question to which the attention of the court is called. And if the law which sanctioned the original judgment expire, pending an appeal, this court has repeatedly reversed the judgment below, although rendered whilst the law existed."

See also: *La Republique Francaise* v. *Schultz*, 57 Fed. 37; *Whitney* v. *Robertson*, 124 U. S. 190; Devlin, Treaty Making Power, p. 196; *Chae Chan Ping* v. *United States*, 130 U. S. 581.

A complaint, warrant and all proceedings in an international extradition are quasi criminal in their nature. *Grin* v. *Shine*, 187 U. S. 181, 187; *Charlton* v. *Kelly*, 229 U. S. 447, 460; *Benson* v. *McMahon*, 127 U. S. 457, 462, 463; *Extradition of Mertz*, 52 F.(2d) 241.

Extradition proceedings pending under a treaty which is abrogated, like criminal and quasi-criminal proceedings pending under any other law which is repealed, are terminated by the abrogation of the treaty in the absence of a saving clause. The case is even stronger where, as here, the subsequent treaty abrogates prior treaties in *express* language.

It is a well settled rule in the United States courts, and without any exception of which we are aware in all the state courts, that, where there is no saving clause:

"If a penal statute is repealed pending an appeal or writ of error, and before the final action of the appel-

late court, it will prevent an affirmance of a conviction, and the prosecution must be dismissed or the judgment reversed." (25 R. C. L. 942.)

The rule stated in the text cited is abundantly supported by authority. *United States* v. *Stafoff*, 260 U. S. 477; *The Rachel*, 10 U. S. 328; *Ex Parte Larkins*, 1 Okla, 53, 25 Pac. 745; *Naylor* v. *City of Galesburg*, 56 Ill. 285. See also note and authorities cited in 23 L. R. A. (N. S.) 243.

Indeed the scope of this rule is so broad that it is applied even in civil cases. Thus in *Board of Public Utility Commissioners* v. *Compania General De Tabacos De Filipinas*, 249 U. S. 425, this Court, in discussing the validity of an order of the Board of Public Utility Commissioners of the Philippine Islands to require reports from certain carriers, said (p. 426):

"After the case was brought here the legislature, by Act 2694, so amended § 16(*e*) as to cause the section itself to prescribe in detail what such reports should contain and thereby abrogated the provision on which the order was based and which the court held invalid. That provision therefore is no longer in force, and it is to the new provision that the board and carrier must give effect. Even if the original provision was valid, the order made under it became inoperative when the new provision was substituted in its place. Whether the order was based on a valid or an invalid statute consequently has become merely a moot question.

In this situation we are not called upon to consider the propriety of the judgment below, the proper course being, as is shown by many precedents, to reverse the judgment and remand the cause with a direction that it be dismissed without costs to either party. *United States* v. *Schooner Peggy*, 1 Cranch. 103; *New Orleans Flour Inspectors* v. *Glover*, 160 U. S. 170, and 161 U. S. 101; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115; *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466; *Berry* v. *Davis*, 242 U. S. 468."

Among other cases holding the rule applicable in proceedings either civil or criminal are the following: *Fong Yue Ting* v. *United States*, 149 U. S. 698; *In re Strobel's Estate*, 39 N. Y. Suppl. 169; *United States* v. *Tynen*, 78 U. S. 88; *Norris* v. *Crocker*, 54 U. S. 429; *The Vestris*, 53 F.(2d) 847 (1931); *Day* v. *City of Clinton*, 6 Ill. App. 476 (1880).

Hence, even if it could be properly said (which is not the case) that the 1932 Treaty covered the identical offenses enumerated in Article X of the Treaty of 1842 and the Convention of 1889, still all proceedings taken under those conventions would be rendered null and void, not only by operation of law but by the fact that the 1932 Treaty expressly repeals all of the provisions of Article X of the Treaty of 1842 and the Convention of 1889 and renders them of "no effect." The adoption of the 1932 Treaty rendered null and void all proceedings and documents issued under the old treaties in all pending matters brought under and by virtue of their respective terms and provisions.

Clearly the Dawes-Simon Treaty of 1932 is a revision and a substitute for all of the prior extradition treaties. The warrant upon which the detention of petitioner was issued under those prior treaties lost any validity which it could be claimed it ever had upon the coming into force of the new treaty.

(1) EXTRADITION PROCEEDINGS AGAINST PETITIONER AND THIS HABEAS CORPUS BASED THEREON WERE PENDING AT THE TIME THE DAWES-SIMON TREATY CAME INTO EFFECT.

There has been no final order of extradition entered against petitioner. The findings of the Commissioner were interlocutory in their nature. These findings amount in law only to a recommendation to the Secretary of State,

who alone may issue the order and warrant of surrender (Sec. 653, 18 U. S. C. A.). The Extradition Act, section 651 of 18 U. S. C. A. provides that the Commissioner shall hear evidence and if he deems it sufficient "to sustain the charge under the proper treaty or convention" he shall certify the same to the Secretary of State. Section 653 then provides that it shall be lawful for the Secretary of State, if he sees fit so to do, to order the surrender of the accused. After the evidence has been certified to the Secretary of State with the recommendation of the Commissioner, the Secretary of State may, in his sole discretion, enter or withhold an order of extradition and the issuance of his warrant of surrender. The Secretary of State had not ordered the extradition of petitioner at the time the Dawes-Simon Treaty of 1932 became operative and Article X of the Treaty of 1842 and the Convention of 1889 repealed. He has not done so to this day. The extradition case is still pending.

This Court held in the case of *Benson* v. *McMahon*, 127 U. S. 457, 463, that international extradition proceedings before a United States Commissioner are preliminary in their nature and are not to be regarded as final.

The habeas corpus proceedings, of course, are still pending, so that this case, in both of its aspects, is still pending and finally undetermined. The repeal of Article X of the Treaty of 1842 and the Convention of 1889 renders the warrant or mittimus, which we shall call an interim warrant or mittimus, null and void, and this Court should, therefore, reverse the Circuit Court of Appeals with directions to affirm the order of the District Court discharging this petitioner.

In *Mensevich* v. *Tod*, 264 U. S. 134, this Court held that on appeal in an habeas corpus case the validity of the detention under a deportation warrant was to be determined by

the treaty in force at the time of the decision on appeal, although the controlling treaty had not been adopted when the Commissioner issued his warrant nor at the time of the decision on habeas corpus in the court below. This Court said (p. 137):

> "The validity of a detention questioned by a petition for *habeas corpus* is to be determined by the condition existing at the time of the final decision thereon."

The repeal of Article X of the Treaty of 1842 and the Convention of 1889 destroyed all force and validity ever claimed for the warrant from which discharge is sought. The petitioner should therefore be discharged.

VII.

The proceeding for petitioner's extradition cannot be maintained for the reason that Article X of the Webster-Ashburton Treaty of 1842 and the Convention of 1889 have been expressly abrogated, and the Dawes-Simon Treaty does not include as an extraditable offense the charge made against your petitioner.

If it be assumed, which petitioner denies, that the present proceedings could continue to be carried on under the Dawes-Simon Treaty of 1932, the proceedings would nevertheless fail, for the reason that the offense charged is not enumerated as an extraditable offense under that Treaty. The difference between the Dawes-Simon Treaty of 1932 and the prior treaties in that respect is manifest.

Paragraph 3 of Section 1 of the Convention of 1889 reads:

> "Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained."

This paragraph of Article 1 is the only clause providing for extradition for any "receiving" offense contained in any treaty prior to the 1932 Treaty. Paragraph 18 of Article 3 of the Treaty of 1932 reads as follows:

> "Obtaining money, valuable security, or goods, by false pretenses; receiving any money, valuable security, or other property, knowing the same to have been stolen or unlawfully obtained."

This paragraph 18 of Article 3 is the only enumeration of any "receiving" offense contained in the 1932 Treaty.

It will be observed that so far as "receiving" offenses are concerned, the 1932 Treaty is far less comprehensive than the provisions of the 1889 Treaty. "Receiving property" knowing the same to have been "fraudulently obtained" is not contained in the 1932 Treaty. Receiving embezzled property is also not enumerated in the 1932 Treaty. The only "receiving" offense made extraditable under the terms of the 1932 Treaty is "receiving" any money or valuable security or other property knowing the same to have been "stolen or unlawfully obtained."

A. Doctrine of ejusdem generis applies to Dawes-Simon Treaty of 1932.

A superficial examination of paragraph 18 of Article 3 might suggest that the words "unlawfully obtained" would be sufficiently broad to cover "fraudulently obtained." Any such first impression vanishes when the absurd result to which such an interpretation would lead is realized. If "unlawfully obtained" is to be construed as including "fraudulently obtained" it must then also be construed as including every obtaining which is in any manner made criminally unlawful. Furthermore, if the language were construed to include the receiving of any money or property unlawfully obtained, the word "stolen" would be deprived of all significance and meaning. It is

only by applying the doctrine of *ejusdem generis* that a reasonable construction of paragraph 18 is possible.

By the established doctrine of *ejusdem generis* "unlawfully obtained" as used in sub-paragraph 18 is juridicially limited by the preceding word "stolen."

In *United States* v. *Stever*, 222 U. S. 167, at 174, this Court said:

> "In such circumstances, unless there is a clear manifestation to the contrary, general words, not specific or limited, should be construed as applicable to cases or matters of like kind with those described by the particular words."

In *United States* v. *Salen*, 235 U. S. 237, in discussing an interpretation sought to be put on general words following specifically enumerated documents, the Court said (p. 249):

> "It would ignore the fact that the meaning of words is affected by their context and violate the settled rule that words which, standing alone might have a wide and comprehensive import will, when joined with those defining specific acts, be interpreted in their narrower sense and understood to refer to things of the same nature as those described in the associated list, enumeration or class. Cf. *Virginia* v. *Tennessee*, 148 U. S. 503, 519; *United States* v. *Chase*, 135 U. S. 255, 258; *Neal* v. *Clark*, 95 U. S. 704, 708."

This doctrine has been consistently followed by the Supreme Court of the State of Illinois. *First National Bank of Joliet* v. *Adam*, 138 Ill. 483.

The doctrine of *ejusdem generis* has been applied in the construction of the prior extradition treaties between the United States and Great Britain in the only two cases which involved the construction of enumerated offences under those treaties. The two cases are *In re Cohen*, 8 Ontario Law Reports, 143, and *In re Rosen*, Vol. 2, Western

Weekly Reports, 1931 (Supreme Court of British Columbia) 799.

In the *Rosen case* extradition was sought from British Columbia to Maryland on a charge of "obtaining goods by false pretenses." The Court held that "goods" was not covered by the words "other property" contained in the Treaty, and said (p. 802):

> "It must be conceded, and the argument proceeded upon the basis, that the offense to be so included must come within the words 'or other property,' and that these words must apply in order to render obtaining goods by false pretenses an extraditable offense.
>
> "It is submitted by the applicant for *habeas corpus* that the maxim of construction, termed '*ejusdem generis*' applies, and that the prior words 'money' and 'valuable security' govern to such an extent as to restrict the meaning of the words 'other property' and thus prevent any construction and application of these words. * * * A great number of American cases are cited in support of this statement of the law. * * *"

And in discussing *In re Cohen,* 8 Ontario Law Reports 143 (1904) the Court further said, in referring to the judge who decided that case (p. 804):

> "At any rate, he took the view, and so expresses himself, that the maxim was applicable and that the words 'other property' simply became an adjunct, as it were, to the previous specific words. I take his judgment to mean that the words 'other property' only gave the color to the previous words and were intended to cover other property of the same kind as those already mentioned, and thus would not include goods."

In the case of *In re Cohen,* 8 Ontario Law Reports 143, extradition was sought from Canada to the State of Illinois on the charge of "unlawfully receiving and having in his possession certain goods and chattels while knowing the same to have been theretofore stolen." The Court applied the doctrine of *ejusdem generis* and held that "goods" was

not included by the use of the words "other property" as used in the enumeration of extraditable offences in the Convention of 1889 between the United States and Great Britain. The Court, in this opinion, after citing with approval the cases of *Hall* v. *Baker*, 74 Wis. 118; *Grissell* v. *Housatonic R. W. Co.*, 54 Conn. 447; *People* v. *New York and Manhattan Beach R. W. Co.*, 84 N. Y. 565; and *First National Bank of Joliet* v. *Adam*, 138 Ill. 483, in referring to *ejusdem generis* said (pp. 150-152):

> "The purpose of this convention was to extend the scope of the existing extradition arrangements between Great Britain and the United States. With this object it introduced into the schedule of extradition crimes certain offences not before included, and amongst them the offense described as 'receiving any money, valuable security, or other property, etc.' The expressed purpose of the convention has been attained whatever interpretation is given to the words 'other property' in this particular clause.
>
> 'Property is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have,' per Langdale, M. R., in *Jones* v. *Skinner* (1831) 5 L. J. Ch. 87. * * *
>
> It is perhaps difficult to conceive why the criminal receiving stolen money, valuable securities and things of that type, should be extraditable rather than the receiver of other kinds of stolen goods or chattels. And yet every offence is not an extradition crime. The framers of the treaty may well have regarded the dealer in stolen money and securities as a more dangerous kind of offender—a criminal usually on a larger scale—than the ordinary, commonplace receiver of stolen goods. We cannot attribute to the framers of this treaty ignorance or forgetfulness of a rule of construction so well established in the jurisprudence of both countries as that in question. * * * Adapting the language of Lindley, M. R., 'I cannot conceive why the treaty-framers should have taken the trouble to specify in this section such special things as

"money" and "valuable securities" except to show the type of thing which they were referring to, and in my opinion "other property" must be taken to mean other property of that type.' * * * Had they meant the general words to be applied without restriction they 'would have used only one compendious' expression."

In framing the Treaty of 1932, it is most significant that the framers changed the provision in question by inserting in the present Section 18 of Article 3 the word "goods" and making it read "obtaining money, valuable security, or goods." Thus the framers specifically conformed in this instance to the decision in *In re Rosen.*

It is necessary to restrict the expression "or unlawfully obtained" to the same type of unlawfulness as stealing, or in other words, to some taking against the will and without the consent of the owner of the property in question, in order to give the words any meaning whatsoever. The term "unlawful" is so broad in its scope that its ordinary and unrestricted meaning would include a civil as well as a criminal "unlawful" obtaining. At all events this solitary adverb can hardly be construed to make the "receiving" of property under any and all of our scores of misdemeanors and felonies extraditable. It could not have been and was not the intention of the high contracting parties to extradite its own citizens as well as the citizens of the opposite party from one country to the other for "receiving" property known to have been "obtained" by someone else in any conceivably "unlawful" manner. If this were true, as far as the treaty is concerned, a person could be extradited for receiving money knowing the same to have been obtained by the violation of any criminal statute condemning such "receiving" although the "obtaining" crime is not made extraditable under the treaty. Obviously the treaty makers could have had no such intent. Once the general term "unlawful" is extended beyond the category of "stolen"

it roams over and embraces every recognized misdemeanor and felony under the law.

Applying the language of the Court in *In re Cohen,* to the use of this term "unlawful" *"we cannot attribute to the framers of this treaty ignorance or forgetfulness of a rule of construction so well established in the jurisprudence of both countries."*

CONCLUSION.

Petitioner submits that the Circuit Court of Appeals was in error in reversing the order of discharge of the District Court on *habeas corpus,* for the reason that the offense charged against him is not made criminal by any law in force in the State of Illinois and is therefore not extraditable. This is true whether Article X of the Treaty of 1842 and the Conventions of 1889 or the Dawes-Simon Treaty of 1932 is now the existing extradition treaty between the United States and Great Britain.

The object of an international extradition treaty is not to secure the unrestricted transfer of an individual from the jurisdiction of one sovereignty to that of another. The object of all extradition treaties between the United States and Great Britain has been to secure that transfer only for the specific offenses enumerated in the Treaty which are also recognized as criminal by the laws of both countries, taking into consideration the dual capacity of the United States Government.

The coming into force of the Dawes-Simon Treaty abrogated this proceeding. But if this were not true, the Dawes-Simon Treaty of 1932 governs the present proceedings, and hence extradition could not take place in the instant case even if the charge laid against the petitioner had been made criminal by some law in force in the State of Illinois, be-

cause the offense with which he is charged is not enumerated as an extraditable offense in that Treaty.

The District Court correctly ordered the discharge of the petitioner on *habeas corpus*. The judgment of the Circuit Court of Appeals should therefore be reversed with directions to affirm the judgment of the District Court discharging petitioner.

Respectfully submitted,

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